Chong Siew Chiang v Chua Ching Geh & Anor

HIGH COURT (KUCHING) — SUIT NO KG150 OF 1985
RICHARD MALANJUM J
16 NOVEMBER 1994

Tort *— Damages — Defamation — Libel in newspaper — Assessment of damages — Plaintiff a politician and a lawyer — Whether exemplary damages should be awarded — When award of exemplary damages appropriate — Factors to be considered*

Civil Procedure *— Interest — Interest after judgment — Parties agreeing to defer assessment of damages after liability established — Whether interest should be awarded from date of liability judgment*

Tort *— Damages — Defamation — Evidence in mitigation — Justification not pleaded — Whether evidence about circumstances under which libel was published may be given — Rules of the High Court 1980 O 78 r 7*

Tort *— Defamation — Libel in newspaper — Photograph of defendant published together with article containing libel — Whether libel made sensational*

The plaintiff sued the defendants for libel following the issue of an allegedly libellous statement by the first defendant which was later published by the *Borneo Post*, of which the second defendant was the publisher. The plaintiff is a politician and a lawyer and had been engaged as counsel by the Kuching Tenants' Association over the issue of the Sarawak Rent Control (Repealed) Ordinance 1984. The first defendant was sued in his personal capacity as well as in his capacity as an officer of the Sarawak United People's Party. The court had earlier held the defendants liable and the present hearing was for the purpose of assessment of damages. In the earlier trial, the defence of justification was not raised by the defendants. The plaintiff contended the court should award both compensatory as well as exemplary damages as his political career had been affected by the libel, which fact was not challenged by the defendants. It was also alleged that the appearance of the photograph of the first defendant and his colleagues accompanying the libel sensationalized it and affected the plaintiff adversely. Further, there was no apology; instead the first defendant issued another statement which aggravated the situation. The plaintiff, however, admitted that his law practice had not been affected by the libel. The defendants submitted that only nominal damages should be awarded and urged the court to consider several mitigating factors. The first respondent contended that no exemplary damages should be awarded as the plaintiff had failed to make out a case for such damages and the statement made was honestly believed to be a necessary response to what the plaintiff had said during the extraordinary general meeting of the Kuching Tenants' Association. The second defendant submitted, inter alia, that it had not been shown that the libel had been published in a sensational

manner or that the second defendant knew or must have known the libel to be untrue. Neither was there any malice and thus, the second defendant contended that exemplary damages was unjustified. The second defendant's counsel called the reporter responsible for the writing of the article which contained the libel who testified about the precautions he took in the writing of the article.

Held, awarding RM30,000 in compensatory damages:

(1) In a libel action, the general rule is that damages are assessed on a compensatory basis. However, in certain circumstances, exemplary damages may be awarded. Compensatory damages may include special damages and if aggravating circumstances exist, aggravated damages can also be awarded.

(2) Before considering any exemplary damages, it must be considered first whether the sum in mind for compensatory damages would be adequate. In the present case, exemplary damages may only be awarded if the libel had been done with guilty knowledge, with the motive that the chances of economic advantage outweigh the chances of economic penalty.

(3) The damage sustained by a plaintiff must depend substantially on the estimation in which he was previously held in the opinion of others unaffected by the libel. It is his reputation and not his character that is relevant in assessing damages.

(4) In this case where the defendants had not pleaded justification, they were not entitled to give evidence in mitigation about circumstances under which the libel was published, because the requirements of O 78 r 7 of the Rules of the High Court 1980 had not been complied with.

(5) The court found several aggravating elements in this case. There was no apology and the conduct of the trial could be considered as protracted and oppressive. The second statement made by the first defendant indicated not only a total lack of remorse but rather a defiance, completely disregarding the clarifications of the plaintiff and the Kuching Tenants' Association, and this evidenced malice. Further, there was an element of recklessness in the publication of the libel.

(6) The photograph of the first defendant which accompanied the libel might have attracted the attention of readers but did not necessarily make the publication of the libel sensational. It is the words or style adopted in a publication which should determine whether or not an article has been published in a sensational manner.

(7) Exemplary damages should not be granted. The court was not satisfied that the defendants published the libel with full knowledge of undue benefits either financially or otherwise.

There was also no evidence adduced that the second defendant unduly gained financially from the publication of the libel.

(8) The plaintiff testified that if the defendants had apologized, the matter would have ended. It could thus be inferred that the initial damage or humiliation the plaintiff might have suffered could not have been that severe.

(9) Since the parties agreed to have the assessment of damages done at a later date, it was only fair that no order for the payment of interest was made from the date of the liability judgment.

[Bahasa Malaysia summary

Plaintif telah mendakwa defendan-defendan atas libel berikutan daripada pengeluaran suatu kenyataan oleh defendan pertama yang dikatakan bersifat libel yang kemudiannya telah diterbitkan oleh *Borneo Post*, suatu penerbitan defendan kedua. Plaintif adalah seorang ahli politik dan seorang peguam dan telah diambil khidmat sebagai peguambela oleh Persatuan Penyewa Kuching atas isu Sarawak Rent Control (Repealed) Ordinance 1984. Defendan pertama telah didakwa dalam keupayaan peribadinya serta dalam keupayaannya sebagai seorang pegawai Sarawak United People's Party. Mahkamah terlebih dahulu telah memutuskan bahawa defendan bersalah dan pembicaraan ini cumalah untuk tujuan pentaksiran ganti rugi. Ketika perbicaraan yang lebih awal itu, pembelaan justifikasi tidak ditimbulkan oleh defendan. Plaintif berhujah bahawa mahkamah patut memberi award ganti rugi pampasan dan teladan kerana kerjaya politiknya telah terjejas oleh libel itu. Hakikat ini tidak dicabar oleh defendan. Juga didakwa bahawa penerbitan gambar foto defendan pertama bersama dengan rakan-rakannya yang mengiringi libel itu telah memberi kesan sensasi kepada libel itu dan telah membawa kesan buruk kepada plaintif. Lagipun, tiada permintaan maaf dibuat; sebaliknya defendan pertama telah membuat satu kenyataan yang lain yang telah memburukkan lagi keadaan. Plaintif, walau bagaimanapun, mengaku bahawa kerjaya guamannya tidak terjejas oleh libel itu. Defendan-defendan berhujah bahawa cuma ganti rugi nominal patut diberikan dan menggesa mahkamah untuk mempertimbangkan beberapa faktor yang bakal mengurangkan ganti rugi. Defendan pertama berhujah bahawa ganti rugi teladan tidak patut diberikan kerana plaintiff telah gagal mendirikan satu kes untuk ganti rugi sedemikian dan defendan pertama mempercayai dengan ikhlas bahawa kenyataan itu adalah jawapan yang perlu diberikan kepada apa yang telah dikatakan oleh plaintif pada mesyuarat agung luarbiasa Persatuan Penyawa Kuching. Defendan kedua berhujah, antara lainnya, bahawa tidak terdapat apa-apa yang menunjukkan bahawa libel itu telah diterbitkan dalam cara yang menimbulkan sensasi atau bahawa defendan kedua tahu atau sepatutnya tahu bahawa libel itu adalah tidak benar. Juga tidak ada sebarang niat jahat dan oleh itu defendan kedua menekankan

bahawa ganti rugi teladan tidak berasas. Peguambela defendan kedua telah memanggil wartawan yang bertanggungjawab untuk penulisan rencana yang mengandungi libel itu dan beliau telah memberi keterangan tentang langkah-langkah bercermat yang telah diambilnya ketika menulis rencana itu.

Diputuskan, memberikan RM30,000 sebagai ganti rugi pampasan:

(1) Di dalam sesuatu tindakan libel, rukun am ialah ganti rugi ditaksirkan atas dasar pampasan. Walau bagaimanapun, di dalam keadaan-keadaan tertentu, ganti rugi teladan boleh diberikan. Ganti rugi pampasan boleh merangkumi ganti rugi khas dan jika keadaan yang menerukkan kes wujud, ganti rugi tambahan juga boleh diberikan.

(2) Sebelum mempertimbangkan sebarang ganti rugi teladan, perlu dipertimbangkan terlebih dahulu sama ada jumlah yang difikirkan untuk ganti rugi pampasan adalah mencukupi. Di dalam kes ini, ganti rugi teladan cuma boleh diberikan jika libel itu telah dilakukan dengan pengetahuan salah, dengan niat bahawa kemungkinan mendapat kelebihan ekonomik melebihi kemungkinan mendapat penalti ekonomik.

(3) Kerosakan yang dialami oleh plaintif mestilah bergantung sebahagian besarnya kepada bagaimana beliau dahulunya dipandang oleh orang lain yang tidak dipengaruhi oleh libel itu. Apa yang relevan dalam mentaksirkan ganti rugi adalah reputasinya dan bukan wataknya.

(4) Di dalam kes ini, di mana defendan-defendan tidak membuat pli justifikasi, mereka tidak berhak mengemukakan keterangan tentang keadaan di mana libel itu telah diterbitkan untuk mengurangkan ganti rugi. Ini adalah kerana keperluan A 78 k 7 Kaedah-Kaedah Mahkamah Tinggi 1980 tidak dipatuhi.

(5) Mahkamah telah mendapati beberapa unsur yang menerukkan kes ini. Tidak terdapat permintaan maaf dan pengendalian perbicaraan ini boleh dikatakan sebagai melengahkan masa dan bersifat menindas. Kenyataan kedua yang dibuat oleh defendan pertama menunjukkan bukan sahaja ketiadaan kekesalan malah satu keingkaran. Beliau telah tidak mengendahkan sama sekali penerangan yang diberikan oleh plaintif dan Persatuan Penyewa Kuching, dan ini membuktikan jiat jahat. Lagipun, terdapat unsur tindakan melulu dalam penerbitan libel itu.

(6) Gambar foto defendan pertama yang mengiringi libel itu mungkin telah menarik perhatian pembaca tetapi tidak semestinya membuat penerbitan libel itu satu sensasi. Apa yang patut menentukan sama ada sesuatu rencana itu telah diterbitkan dalam cara yang menimbulkan sensasi adalah perkataan atau gaya yang digunakan.

(7) Ganti rugi teladan tidak patut diberikan. Mahkamah tidak berpuas hati bahawa defendan-defendan telah menerbitkan libel itu dengan pengetahuan yang penuh tentang faedah yang tidak berpatutan sama ada dari segi kewangan atau sebaliknya. Juga tidak terdapat keterangan yang dikemukan bahawa defendan kedua telah memperolehi faedah kewangan secara tidak berpatutan daripada penerbitan libel itu.

(8) Plantif telah memberi keterangan bahawa sekiranya defendan telah meminta maaf, perkara ini mungkin telah tamat. Oleh itu bolehlah disimpulkan bahawa kerosakan awal atau perasaan malu yang mungkin telah dialami oleh plaintif mungkin tidak begitu teruk.

(9) Oleh kerana pihak-pihak yang berkenaan telah bersetuju bahawa pentaksiran ganti rugi dijalankan pada satu tarikh yang lebih lewat, adalah adil bahawa tiada perintah dibuat untuk pembayaran faedah dari tarikh penghakiman tentang liabiliti.]

Notes

For cases on damages for defamation, see 12 *Mallal's Digest* (4th Ed) paras 42–51; [1989] Mallal's Digest 646–647; [1990] Mallal's Digest 481, 491.

For cases on interest after judgment, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1747.

Cases referred to

CS Wu v Wong Look Fung & Ors [1981] 1 MLJ 178 (refd)

Datuk Harris bin Mohamad Salleh v Abdul Jalil bin Ahmad & Anor [1984] 1 MLJ 97 (refd)

Datuk Patinggi Abdul Rahman Ya'kub v Abang Mohammad bin Abang Anding [1979] 2 MLJ 185 (folld)

John Fairfax & Sons Ltd v Carson & Slee; John Fairfax & Sons Ltd v Carson (1991) 24 NSWLR 259 (refd)

Lee Kuan Yew v Seow Khee Leng [1991] 1 MLJ 177 (refd)

McCartney & Boal v Sunday World (*The Times*, 22 October 1988) (refd)

Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Bhd & Anor [1973] 2 MLJ 56 (refd)

Legislation referred to

Rules of the High Court 1980 O 78 r 7

Sarawak Rent Control (Repealed) Ordinance 1984

George Lo (*Arthur Lee* with him) (*Arthur Lee & Co*) for the plaintiff.

Anthony Phua (*Yong & Co*) for the first defendant.

Ting Sing Chuan (*Yong & Wong*) for the first defendant.

Cur Adv Vult

Richard Malanjum J:

I INTRODUCTION

On 8 July 1992, I delivered my judgment (hereinafter referred to as 'the liability judgment') on the issue of liability in this action. Such a course of action was taken at the request of the parties. Upon the direction of the Federal Court that the quantum of damages should be assessed first before the appeal on the liability judgment could proceed further, hearing on the assessment of damages was therefore held within the time-frame stipulated by their Lordships and this is my judgment after the hearing.

In respect of the standings of the respective parties in this action, I have already stated them in the liability judgment and I will rely on them when necessary in this judgment. Further, the facts as found in the liability judgment will also be relied upon where appropriate.

II CONTENTIONS OF THE PARTIES

It is the contention of the plaintiff that in assessing the quantum of damages to be awarded, this court should consider the quantum, bearing in mind the following, namely:

(i) compensatory damages; and

(ii) exemplary damages.

Learned counsel for the plaintiff submitted that under compensatory damages the following factors should be taken into account, namely:

(a) the conduct of the defendants;

(b) the attitude of their counsel at the trial;

(c) the existence of express malice;

(d) the nature of the libel;

(e) the extent and mode of publication;

(f) absence of any apology;

(g) the position of the plaintiff before the publication of the libel; and

(h) the period of anxiety pending disposal of this case.

Recklessness and the repetition of the libel were also added to be considered but I would think that such factors could come under conduct of the defendants.

For the first defendant, and in suggesting that the damages to be awarded should be nominal in the region of one sen, this court was urged to take into account several mitigating factors, namely:

(a) the conduct of the plaintiff on the day of the incident which triggered off the libel;

(b) the position and standing of the plaintiff;

(c) nature of the libel;

(d) the reasons for no apology being given; and

(e) the motive of the first defendant.

As for the second defendant, its learned counsel associated himself with the submission of the learned counsel for the first defendant and thus suggested nominal damages as well. Learned counsel for the second defendant also contended that the following factors should also be taken into account in assessing the quantum, namely:

(i) the circumstances preceding the publication of the libel;

(ii) the extent of the publication of the libel;

(iii) the consequence of the libel upon the plaintiff, in particular in terms of financial loss; and

(iv) the honest belief of the second defendant in publishing the libel, namely, that it felt honestly that it was publishing a fair comment.

The plaintiff is also claiming for exemplary damages to be awarded to him. His bases for asking such damages are similar, if not the same, to those under compensatory damages. It was emphasized, however, that these factors, namely:

(a) the wilful and abusive conduct of the first defendant at the time of publication of the libel and his scornful and obstinate behaviour subsequent to the publication;

(b) malice;

(c) recklessness in publishing the libel;

(d) abusive, oppressive and insulting conduct of the counsel of the defendants; and

(e) advantages obtained by the defendants,

should justify the award of exemplary damages.

On the other hand, learned counsel for the first defendant submitted that no exemplary damages should be considered as the plaintiff had failed to make out a case for such damages and that the first defendant honestly and sincerely believed that the statement he made, which was found to be libellous, was a necessary and appropriate response to what the plaintiff had said to the tenants on 5 June 1985 during the extraordinary general meeting of the Kuching Tenants' Association held at the Hill Top Restaurant Kuching.

For the second defendant, on the issue of exemplary damages, it was submitted on its behalf that nothing was shown that the libel was published in a sensational manner, that it was not shown that the second defendant knew or must have known that the libel was untrue and unfounded, that there was no intention either to incite hatred towards the plaintiff or the destruction of peace and order in publishing the libel and that the second defendant had no malice towards the plaintiff. Accordingly, learned counsel contended that the claim for exemplary damages was unjustified.

III THE GUIDING PRINCIPLES IN THE ASSESSMENT OF DAMAGES

Several authorities were cited by the learned counsel for the parties, highlighting factors which this court should take into account in considering the quantum for both the claims, namely, compensatory and exemplary damages.

But it is to be noted, first, that there was no application by any of the defendants for a separate assessment of damages. Secondly, it was not in dispute that justification was not pleaded as a defence in this action.

In the case of *Datuk Patinggi Abdul Rahman Ya'kub v Abang Mohammad bin Abang Anding* [1979] 2 MLJ 185 at p 187 col 2B–E, his Lordship Seah J (as he then was) said:

> In a libel action, the general rule is that damages are assessed on a compensatory basis. However, in certain circumstances, exemplary damages, or punitive damages as they are otherwise described ... may be awarded.
>
> Compensatory damages may include not only actual pecuniary loss and anticipated pecuniary loss or any social disadvantage which result, or may be thought likely to result, from the wrong which has been done. They may also include the natural injury to his feelings — the natural grief and distress which he may have felt at having been spoken of in defamatory terms, and if there has been any kind of high-handed, oppressive, insulting or contumelious behaviour by the defendant, which increases the mental pain and suffering caused by the defamation and may constitute injury to the plaintiff's pride and self-confidence, these are proper elements to be taken into account in a case where the damages are at large. But these matters may not be taken into account as a reason for giving punitive damages ... In short, compensatory damages may include special damages and if aggravating circumstances exist, aggravated damages can also be awarded.

Further down in his judgment at p 189 col 1E–F, his Lordship continued to say this:

> It is important to remember that the defendant's conduct between the date of publication of the libel and the trial of the action may thus increase the damages. In this sense it may be said to 'aggravate' the damages recoverable as conversely, the publication of an 'apology' may 'mitigate' them. On the other hand the defendant's conduct after the publication of the libel may also afford cogent evidence of his malice in the original publication and thus evidence upon which 'aggravated damages' may be awarded. It should be emphasized that the sum to be awarded is a single sum and that aggravated damages are intended as compensation for the plaintiff and not as a form of punishment to the defendant.

In respect of exemplary damages, they may be awarded:

> ... apart from cases where they are prescribed by statute, for two categories only:
>
> (i) [acts of governmental staff]; and
>
> (ii) where the defendant's tortious act has been done 'with guilty knowledge, for the motive that the chances of economic advantage

> outweigh the chances of economic, or perhaps physical penalty'. It must be the plaintiff himself who suffers by such conduct, if he is to receive punitive damages; ... (*Gatley on Libel and Slander* (8th Ed) para 1454.)

Restraint should also be exercised in assessing exemplary damages. In assessing such damages, there must be no double counting and no question of adding together sums fixed as compensatory damages and as exemplary damages. Before considering any exemplary damages it must be considered first whether the sum in mind for compensatory damages would be adequate. In view of the outrageous conduct of the defendant and to indicate disapproval of such conduct and as a deterrence, an additional sum may be added to bring the sum sufficient as punishment.

In considering the guiding principles on the assessment of damages, the law pertaining to the admission of evidence for the purpose of mitigating damages must also be noted. This is important as the damages sustained by a plaintiff must depend substantially on the estimation in which he was previously held in the opinion of others, unaffected by false statements to his discredit. It is his reputation and not his character that is to be considered in assessing damages. (See *Gatley on Libel and Slander* at para 1415). Thus, evidence of general bad reputation of a plaintiff is admissible but it must be relevant to the libel and confined to the period before or at the time of the publication of the libel.

However, evidence of particular acts or conduct on the part of the plaintiff tending to show his character and disposition is excluded. This is particularly so where justification is not pleaded. A defendant cannot, under the pretext of giving evidence on the bad character of the plaintiff, adduce evidence-in-chief or by way of cross-examination of the plaintiff or his witness, any facts or incidents in the plaintiff's life which tend to establish the truth of the libel or any part thereof. Any attempt to give evidence of such facts in chief or to elicit them in cross-examination is a fact which the court is entitled to take into consideration as a ground for aggravating the damages.

Further, O 78 r 7 of the Rules of the High Court 1980 must also be borne in mind.

Order 78 r 7 reads:

> In an action for libel or slander, in which the defendant does not by his defence assert the truth of the statement complained of, the defendant shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the Judge, unless 7 days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence.

The above provision applies even where a defendant intends to adduce evidence of any facts or circumstances which tend to show the absence of any malicious motive or intention on his part.

IV THE EVIDENCE AND FINDINGS

(a) *The plaintiff's version*

In his evidence, during the hearing on the assessment of damages, the plaintiff testified regarding his sour relationship with the newspaper, *Borneo Post*. And while the newspaper claimed to be the most widely read daily in East Malaysia, the plaintiff could not confirm whether the libel was also published for the Sibu and Miri circulations. His explanation was that he could not get a copy of the newspaper from those towns.

Further, there was no evidence adduced that the answers given in the interrogatories were untrue.

The plaintiff went on to testify of the effect on him due to the publication of the libel. He said that telephone calls came in seeking an explanation. He had to get his wife involved in explaining to the callers. He also called for a press conference where he demanded an apology from the first defendant within three days. According to the plaintiff, reports on his press conference were published in the Chinese newspapers but not in the *Borneo Post*. And although a reporter for the newspaper attended the press conference, the plaintiff said that he left early in a 'very angry manner'. The plaintiff went on to explain that he had to call the Chinese reporters as the libel was published in most, if not all, of the local Chinese newspapers.

The appearance of the photograph of the first defendant and his colleagues accompanying the libel was also considered by the plaintiff as having affected him adversely. As regards the demand for apology, the plaintiff said that no apology was given. Instead, the first defendant issued another statement (exh P7) which aggravated the situation in that the plaintiff was told 'not to hold his horses'. The fall out of such a development resulted in this action with the plaintiff having applied successfully for an interlocutory injunction which according to him was strenously opposed by the defendants.

With regard to the attitude of the first defendant, the plaintiff testified that his feelings were very much aggravated when the first defendant ignored the clarification of the Kuching Tenants' Association which indicated that what the first defendant had said was not true. The plaintiff also said that an apology from the defendants would have settled matters without any further action.

In respect of the effect of the libel on his political career, the plaintiff asserted that it was affected by the libel. According to him, his bid for the Sarikei Parliamentary constituency in the election held the following year saw not only his loss of the seat but also of some supporters who were once his friends. And the plaintiff attributed the libel to have caused the loss. He also claimed that his vote loss in that election was larger than the previous ones. As a result, he thereafter gave up the idea of contesting in subsequent elections and also refused nominations in any post either in his political party or in the Advocates Association of Sarawak.

According to the plaintiff, the police were also involved when he was called to give an explanation as a result of the police report lodged by the

A first defendant. But he admitted that it was not necessarily connected to the libel. Anyway, the matter was subsequently closed. The cross-examination of the plaintiff by the learned counsel for the first defendant was substantially on the circumstances surrounding the publication of the libel. In my view, it was an attempt to justify why the libel was published or the motive for its publication.

B

However, I do not think I should consider that aspect of the evidence by reason of O 78 r 7 of the Rules of the High Court 1980 and the established principles of law as discussed above. There was no dispute that no notice was given and no formal application in writing for leave was made. And the court is not expected to guide any counsel coming before

C it on the law.

Anyway, in answer to a question, the plaintiff said that he was engaged only as counsel by the tenants over the issue of the Rent Control Repealed Ordinance. As for the learned counsel for the second defendant, his line of questioning was on the extent of the publication of the libel, the

D press conference of the plaintiff and the mode of the presentation of the libel. I noted that the plaintiff explained why he could not say for sure whether the libel was published in Sibu and Miri. He also explained how his press conference was conducted, namely, in Chinese first followed by English. The reason was that there were more Chinese reporters present and that he wanted the report to be published in the Chinese daily, *Berita*

E *Petang*, that afternoon.

The plaintiff also confirmed that in an earlier action he took against the second defendant, it was settled for the sum of RM22,000 and an apology. In that action, the plaintiff said that he was accused of swindling other people's money.

F

Learned counsel for the second defendant also enquired from the plaintiff whether he would consider the publication of the news item in exh D1 as sensational, wherein he (the plaintiff) was amongst the several persons in the photograph. In reply, the plaintiff said that the photograph was not intended for the newspapers but for the tenants' association

G souvenir magazine. But in my view it is not the purpose of taking the photograph that is in issue. The question is whether the appearances of the photographs in exh P6 and exh D1 have made the respective news items sensational.

There were also questions posed on the circumstances leading to the

H publication of the libel. But as stated earlier on in this judgment, I do not think I should consider such an issue in this assessment of damages.

When questioned by the court, the plaintiff was frank that his existing clients in his legal firm did not pull out their cases after the publication of the libel.

I (b) *First defendant's version*

The evidence of the first defendant centred around the circumstances and reasons for him to issue exh P6 (the libel). He also said that he had no intention of revenge against the plaintiff and that as a statement from his

political party branch he found nothing wrong with it. According to the first defendant, the issue of rent control was also topical at that time. A

Again I must state here that learned counsel appears to have missed the purpose of this hearing and the nature of evidence that should be adduced and the governing rules thereof. With respect, I do not think I should consider that aspect of the evidence for the same reason as stated earlier on in this judgment. B

Under cross-examination by the learned counsel for the plaintiff, the first defendant admitted the following:

(i) that he did lodge a police report and he told the press about it;

(ii) that he submitted a letter to the Advocates Association of Sarawak (though addressed as the Sarawak Bar Council) concerning the plaintiff with a view for a disciplinary action to be taken; C

(iii) that he subsequently issued exh P7 even after reading the statement issued by the Kuching Tenants' Association where he said that the person who issued the statement was a person of ill repute; and D

(iv) that he is a responsible person.

As for the cross-examination by the learned counsel for the second defendant, the replies given by the first defendant substantially dealt with the reasons and circumstances in the issuance of exh P6. For the reason stated earlier, I should also ignore this part of the evidence. E

(c) *Second defendant's version*

For the second defendant, learned counsel called Mr Sulok Tawie (DW4). It is to be noted that this witness was the reporter responsible for the writing of exh P6 which contained the libel. F

In his evidence, he admitted that he was the assigned reporter on matters pertaining to the Rent Control (Repealed) Ordinance 1984 in 1985. He went on to testify of the precaution he took in the writing of the article which subsequently appeared as exh P6. I am of the view that this part of his evidence was brought in hoping to dispel malice in the publication of the libel and thus would mitigate the damages involved. But then I do not think it was done in accordance with the procedural rule and I should not therefore take that into account. No doubt in the subsequent part of his testimony, he dealt with the press conference of the plaintiff and stated the reason for his leaving early. There was an objection to that part of his evidence but I allowed it as, in my view, that part of his evidence was relevant, being an extension of the preceding answer given and was not connected to the actual publication of the libel. It was also a subsequent event and, although it might still be linked to the issue of malice, I also noted that the plaintiff in his evidence brought up that subject charging that DW4 left in 'an angry manner'. Thus, it was only fair that this witness should be given the opportunity to answer that charge and not so much on the issue of malice or the circumstance surrounding the publication of the libel. G H I

A And thus, the explanation of this witness as to why he left early was that the press conference was held in Chinese which he could not understand and that he felt he was ignored.

The initial part of the cross-examination of this witness by the plaintiff was also on the circumstances leading to the publication of the B libel. But in view of what I have said earlier in this judgment, I should also disregard that part of the evidence.

Next, the plaintiff asked about this witness's quarrels with him. He replied that there was none that he knew of. He admitted, however, to having an argument in 1985 with the plaintiff.

C When the plaintiff put to this witness that he was not ignored during the press conference of the plaintiff, he replied by demonstrating how the plaintiff waved at him when he enquired. He added that the waiting period and the action of the plaintiff made him frustrated and disappointed. It is also to be noted that this witness admitted that in making his report which appeared in exh P7 he did not check the earlier statement of the plaintiff D for which exh P7 was intended as a reply.

(d) *Findings of the court*

From the evidence adduced by the parties, I find the following as facts:

E (i) that the publication of the libel did not extend to Sibu and Miri districts;

(ii) that the libel did not have any adverse effect on the plaintiff's legal practice;

(iii) that there was no apology from the defendants to the plaintiff; and

F (iv) that there was no dispute as to the standing of the plaintiff, a lawyer and a politician.

It is also to be noted that the defendants did not challenge the claim of the plaintiff that after the publication of the libel in question he had refused nominations to any post in the political party to which he belongs, namely, G the Democratic Action Party (DAP) or the Sarawak Advocates Association.

Having therefore considered the evidence adduced as a whole, I am of the view that in making the award for compensatory damages the aggravating elements must also be taken into account in this case. I find several aggravating elements in this case which should have an effect on the quantum of damages to be awarded. They are, inter alia, as follows:

H

(i) there was no apology in any form issued by the defendants;

(ii) the publication and the contents of exh P7 by the first defendant subsequent to the libel indicate not only a total lack of remorse but, rather, defiance, completely disregarding the clarifications or I explanations of the plaintiff and the Kuching Tenants' Association as shown in exhs P2 and P1 (p 20), respectively. Such an attitude, in my view, can be taken as evidence of malice on the part of the first defendant;

(iii) that the conduct of the defendants in the course of the trial can be described as protracting and oppressive. This is because of the questions put to the plaintiff which implied that what the first defendant had said was true or justified, when the defence contained no plea of justification. Even at the hearing on the assessment of damages, the attitude of the defendants can be summed up as disdainful. One example can be found in the submission of the learned counsel for the first defendant at p 25 of 'A' which reads:

> If justice has been done by the award of the bigger amount, then in the light of the prevailing circumstances existing at the time the remarks were made, justice definitely has not been seen to be done.

And this statement was made after the learned counsel had urged the court to give 'one sen' damages to the plaintiff. In my opinion, the defendants or their counsel have no standing to utter on the 'prevailing circumstances' at this stage of the action when they failed to comply with the relevant O 78 r 7; and

(iv) that there is an element of recklessness in the publication of the libel. I find that the first defendant in making his press statement which was published by the second defendant (exh P6 — the libel), there was absence of or very little precaution taken. Even if I were to consider the steps taken by the first defendant in verifying what was said by the plaintiff, which I should not in view of my reason given earlier in this judgment, his account of the event should be taken with suspicion. At the hearing on assessment, the first defendant testified that he heard the tape recording of the speech of the plaintiff. But nothing on this issue was ever said during the hearing on liability either by the first defendant or Ting Meng Hock (DW1). The first defendant only said that Ting Meng Hock offered to play the tape.

As regards the nature of the libel, I had expressed my view on it which was reflective of para 6 of the reamended statement of claim in the liability judgment. However, the effect of the libel on the reputation of the plaintiff should be a matter that requires a more serious consideration in assessing the quantum of damages.

It was also contended on behalf of the plaintiff that the appearance of the photograph accompanying the libel (exh P6) made it sensational. With respect, I do not think so. The photograph may attract the attention of readers but does not necessarily make the publication of the libel sensational. In my view, it is the words or the style adopted in the publication that should determine whether or not an article is published in a sensational manner.

The plaintiff is also praying for exemplary damages. But having reviewed the evidence, I do not think I should grant any exemplary damages. I am not satisfied that the defendants published the libel with a full knowledge of undue benefits either financially or otherwise. No doubt there are aggravating factors but they do not justify the award of exemplary damages to the plaintiff. There was also no evidence adduced that the

second defendant unduly gained financially arising from the publication of the libel.

V THE AWARD

In dealing with the quantum of damages to be paid, I am of the opinion that this court is entitled to consider the awards of previous cases by the courts of this country. But the paramount consideration is that any award to be given should be viewed as a compensation to the plaintiff for the harm to his reputation and feelings.

Learned counsel for the plaintiff did not indicate in clear terms as to the quantum the plaintiff should be entitled although he cited several cases, inter alia, *Lee Kuan Yew v Seow Khee Leng* [1991] 1 MLJ 177; *John Fairfax & Sons Ltd v Carson & Slee; John Fairfax & Sons Ltd v Carson* (1991) 24 NSWLR 259, CA; *McCartney & Boal v Sunday World (The Times*, 22 October 1988) and *Datuk Harris Bin Mohamad Salleh v Abdul Jalil Bin Ahmad & Anor* [1984] 1 MLJ 97. The awards of these cases ranged between RM1m and RM100,000. In *Datuk Harris*'s case, the award given was RM100,000 and the plaintiff was then the Chief Minister of Sabah. There was also no apology to the plaintiff in that case.

In *Datuk Patinggi Abdul Rahman Ya'kub*, his Lordship Seah J also said this at p 188 col 2G:

> These cases seem to support the proposition that the 'higher' the plaintiff's position the heavier the damages ... The reasons appear to be that such persons are more vulnerable to defamation in so far as they are more well-known, often hold public positions of considerable responsibility and trust, come into contact with more people and may have a wider circle of friends.

In that case the award given was RM25,000 but there was also an apology.

On the other hand, learned counsel for the defendants contended that the award should be nominal in the region of one sen. With respect, I am unable to agree with them. It was not disputed by the plaintiff that in the action which he took against the second defendant and another in suit No 94 of 1979, the agreed settlement was RM20,000 with RM2,000 costs and an apology published. Indeed in this present action, he testified that if the defendants had apologized that would have been the end of the matter. It can therefore be inferred from that evidence that the initial damage or humiliation the plaintiff might have suffered could not have been that severe.

In *CS Wu v Wong Look Fung & Ors* [1981] 1 MLJ 178 which involved a lawyer, the award given was S$25,000 as compensatory damages. In that case, the libel was published without the plaintiff creating an opportunity for the libel to be made. Further, there was no contest on the issue of liability.

In the present case, however, it is not in dispute that the plaintiff did put himself into a situation which could attract comments. Of course those who respond do so at their own risk. Nevertheless, such a situation as the plaintiff found himself in, in my view should be taken into account as a mitigating factor in considering the quantum of damages to be awarded.

Bearing therefore in mind all the foregoings, the sum of RM30,000 as compensatory damages and payable by the defendants should be the appropriate award to the plaintiff for the libel. I am of the view that the amount should be 'fair and adequate to vindicate him to the public and console him for the wrong done' (see *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Bhd & Anor* [1973] 2 MLJ 56).

The learned counsel for the plaintiff, in his submission, also requested for interest on the award to be given. It is settled law that the object of awarding damages in a defamation action is to compensate the aggrieved party. However, learned counsel for the plaintiff submitted that interest should be awarded from the date of the liability judgment. I have considered the argument and it is my view that in this case since both parties agreed to have the assessment done later, it is only fair that no order for the payment of interest should be made. Further, I note that interest is not prayed for in the reamended statement of claim.

In the exercise of my discretion, and having considered the issues involved in this case, I do not think the plaintiff is entitled to costs for two counsel. I, therefore, award costs for one counsel to the plaintiff to be taxed.

Order accordingly.

Reported by Kevin Ooi